

Congress of the United States
U.S. House of Representatives
Committee on Small Business
2561 Rayburn House Office Building
Washington, DC 20515-6515

December 5, 2023

The Honorable Alan F. Estevez
Under Secretary of Commerce for Industry and Security
U.S. Department of Commerce
4th and Constitution Avenue, NW, Room 3876
Washington, DC 20230

Dear Under Secretary Estevez:

The House Committee on Small Business writes to inquire about the Bureau of Industry and Security's (BIS), recent 90-day pause on issuing commercial firearm export licenses.¹ This prohibition places a substantial burden on those businesses and individuals that rely on exporting as a source of income and for manufacturers of weapons and ammunition. It appears that the Department of Commerce and BIS may not have properly considered the impact of this decision on American businesses, especially smaller entities, nor sufficiently rationalized its decision to comply with the Constitution and its principles.

The Committee is unsure of how to properly characterize the document the BIS's made its announcement with, as it is listed as a Frequently Asked Question (FAQ) document.² A FAQ document hardly seems like the proper venue for announcing a restriction that touches and concerns a fundamental right enumerated in the Bill of Rights.³ Further, this announcement does not adequately explain the basis for why such a prohibition is necessary.⁴ The FAQ document's only rationale for this action is that it "will enable the Department to more effectively assess and mitigate risk of firearms being diverted to entities, or activities that promote regional instability, violate human rights, or fuel criminal activities."⁵ While these reasons could potentially be sufficient if fully explained, BIS has not articulated why these things are of concern, to what extent an issue exists, nor does the BIS tie this action, either directly or indirectly, to any ongoing foreign policy issues. Additionally, in this order the BIS did not prohibit licensure for the export

¹ BUREAU OF INDUSTRY AND STATISTICS, FIREARMS PAUSE & REVIEW: FREQUENTLY ASKED QUESTIONS (Oct. 27, 2023)(For the purposes of this letter, the terms pause, ban, and moratorium will be used interchangeably).

² BUREAU OF INDUSTRY AND STATISTICS, FIREARMS PAUSE & REVIEW: FREQUENTLY ASKED QUESTIONS (Oct. 27, 2023) (The Committee also located document from the International Trade Administration which more closely resembled an announcement document but contained even fewer details).

³ U.S. Const. amend. II.

⁴ BUREAU OF INDUSTRY AND STATISTICS, FIREARMS PAUSE & REVIEW: FREQUENTLY ASKED QUESTIONS (Oct. 27, 2023).

⁵ *Id.*

of Torture Devices (ECCN 0A983).⁶ If the BIS's order is based on the fear of human rights abuses, this seems a more obvious place to start.

The BIS's actions, are not rooted in a delegation from Congress as was the case in *United States v. Curtiss-Wright Export Corp.*, and the document contains far too little information to support a claim of unilateral executive authority.⁷ What's more, this FAQ document borders on carrying the force of law, meaning it may require an actual rulemaking to effectuate lawfully under the Administrative Procedure Act. For example, in *General Electric Company v. E.P.A.*, the D.C. Circuit found that a guidance document issued by the Environmental Protection Agency (EPA), which outlined when and how it would accept applications for plans to conduct certain types of waste disposal, carried the force of law, and required a rulemaking.⁸ Rulemakings which have a significant impact on a substantial number of small entities are required to comply with the Regulatory Flexibility Act, and explain the rules impact on small entities.⁹

It is clear that this pause will have negative impacts on small entities, which this FAQ document does not, in any way, consider. While this FAQ document is not itself a rule, notwithstanding whether this action requires a rulemaking, it is certain to have economic effects. These effects will be amplified for small businesses, who are less financially insulated from changes in the economy; especially when those changes may upend their business for 90 days. Additionally, this "pause" serves as an outright ban on new, potentially small exporters entering the market. Additionally, the FAQ document lacks important details and is difficult to find on the BIS's or Department of Commerce's website. It is unclear how the BIS anticipates businesses, especially smaller businesses, would even understand that this moratorium has been put in place, let alone understand how to comply.

It is important for agencies to examine small business interests—which make up 99.9 percent of all businesses in the United States. America's small businesses deserve to have their voices heard and considered. We therefore request the following information as soon as possible but no later than December 19, 2023:

1. An explanation for why the BIS believes a Frequently Asked Question document is the best forum to announce a 90-day "pause" on the issuance of export licenses.
2. An estimate on the number applications the BIS will not review during this moratorium, including a specific estimate for small entities.

⁶ BUREAU OF INDUSTRY AND STATISTICS, FIREARMS PAUSE & REVIEW: FREQUENTLY ASKED QUESTIONS (Oct. 27, 2023) (The committee understands that pursuant to CCL Control § 742.11 there is a presumption licenses to export torture devices will be denied absent sufficient reasoning. Still, torture devices were still not included in the 90-day export license prohibition).

⁷ *United States v. Curtiss-Wright Export Corp.*, held that the President had substantial authority to restrict exports based on the foreign policy powers inherent in Article II of the United States Constitution. However, the export restrictions at issue in *Curtis-Wright* involved a power explicitly granted by Congress through a Joint Resolution, and that the export restrictions at issue were taken for clearly stated reasons, that being the Chaco Wars.

⁸ *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 382 (D.C. Cir. 2002).

⁹ See Generally The Regulatory Flexibility Act, 5 U.S.C. § 301-612.

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3. An estimation of the true cost to firearm, component, and ammunition manufactures of this rule, including a specific estimate for small firearm, component, and ammunition manufacturers.
4. The average estimated lost profits for an export license applicant, whose application will be held for up to 90 days.
5. An explanation of the constitutional basis and rationale used by the BIS to determine it had the authority to establish this prohibition.

To schedule the delivery of your response or ask any related follow-up questions, please contact the Committee on Small Business Majority Staff at (202) 225-5821. The Committee on Small Business has broad authority to investigate “problems of all types of small business” under House Rule X. Thank you in advance for your cooperation with this inquiry.

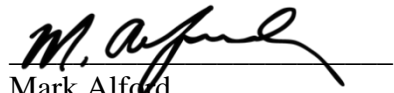
In God We Trust,



Roger Williams
Chairman
Committee on Small Business



Tracey Mann
Member
Committee on Small Business



Mark Alford
Member
Subcommittee on Oversight,



Eli Crane
Member
Committee on Small Business



Aaron Bean
Member
Committee on Small Business

cc: The Honorable Nydia M. Velasquez, Ranking Member
Committee on Small Business